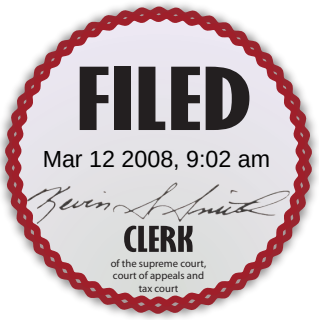

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IN THE
COURT OF APPEALS OF INDIANA

KENNETH PITTS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 61A04-0710-PC-593
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Sam A. Swaim, Judge
Cause No. 61C01-9712-DF-128

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kenneth Pitts appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his seven convictions for Class D felony theft and the finding that he is an habitual offender. We affirm.

Issue

The sole restated issue is whether the post-conviction court correctly rejected Pitts's claim that he received ineffective assistance of appellate counsel.

Facts

On December 15, 1997, the State charged Pitts with seven counts of Class D felony theft and alleged that he was an habitual offender. The sole direct evidence against Pitts came from the testimony of John Hobson. Police discovered numerous items of stolen property in Hobson's possession, as well as illegal drugs. Hobson was charged with a total of nine crimes but pled guilty to only three charges, thus reducing his total sentencing exposure from sixty-nine to twenty-six years. The plea agreement provided that Hobson had to testify "openly, honestly, and truthfully" if requested to do so by the State. Trial R. p. 943. At trial, Hobson implicated Pitts in the theft of some of the items found in his possession.

During voir dire, the prosecutor repeatedly mentioned the fact that Hobson had pled guilty and, as part of the plea agreement, promised to "testify openly, honestly and

truthfully when requested by me."[1] Id. at 265. The prosecutor also attempted to gauge prospective jurors' reaction to the plea agreement and Hobson by asking to imagine themselves as a police officer attempting to solve a theft and whether he or she would enter into a plea agreement with a suspect who then would testify against an accomplice. The prosecutor also told several prospective jurors that she once had been a theft victim herself, and that the crime had been solved only because a suspect had given a "clean-up statement," or a statement by a suspect that implicated other persons. Id. at 300.

During trial, the prosecutor called Hobson's defense attorney to the stand. The attorney testified regarding Hobson's plea agreement, namely that the plea was entered into "voluntarily," that Hobson agreed to testify "openly, honestly and truthfully," and that the attorney believed Hobson was attempting "to turn his life around." Id. at 938, 939, 965. Through the defense attorney, the prosecutor introduced Hobson's plea agreement into evidence.

During closing argument, the prosecutor said:

> I presented to you John Hobson's plea agreement, his testimony about that guilty plea and his attorney to also explain it. You see in that agreement that I am free to argue for twenty-six years at his sentencing hearing. I know it and John Hobson knows it. He also knows that Judge Brown is his sentencing Judge. It does him no good whatsoever either in my eyes or her eyes to not tell the truth. I know in my gut that John Hobson testified truthfully yesterday, but it only matters what you think, what your common sense tells you,

[1] According to the trial record, the prospective jurors were voir dired individually and separately, so although the prosecutor might have repeatedly mentioned some facts, each prospective juror only heard those facts once.

> what your life experiences tell you and what your wisdom tells you about this evidence. You are the sole judges.

Id. at 1262-63. Pitts's trial attorney did not object to any of the references to Hobson's plea agreement or testimony. The jury convicted Pitts as charged and he pled guilty to the habitual offender charge. The trial court sentenced Pitts to the maximum possible sentence, which was twenty-five and a half years.

On direct appeal, appellate counsel raised one issue: whether trial counsel was ineffective for telling prospective jurors during voir dire about Pitts's criminal history, as well as during trial telling jurors about his criminal history, juvenile delinquency history, frequent unemployment and drug use, receipt of government benefits, and problems in school. In our decision affirming Pitts's convictions, we concluded that trial counsel's references to Pitts's criminal history constituted a reasonable strategic and tactical decision. Pitts v. State, No. 61A05-9804-CR-216, slip op. at 3-4 (Ind. Ct. App. Feb. 24, 1999). We did not directly address Pitts's claims regarding references to his delinquency history, unemployment, drug use, receipt of government benefits, and school problems.

On December 16, 2002, Pitts filed a PCR petition, which later was amended by counsel. The petition alleged that Pitts received ineffective assistance of both trial and appellate counsel with respect to failing to object to the prosecutor's alleged improper vouching for Hobson and other related conduct. On September 28, 2007, the post-conviction court denied both claims for relief. Pitts now appeals.

Analysis

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Id. "If an issue was raised and decided on direct appeal, it is res judicata." Id. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

"In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." Stephenson, 864 N.E.2d at 1028. We review factual findings of a post-conviction court under a "clearly erroneous" standard but do not defer to any legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id.

We note that in this appeal Pitts restates his claims of ineffective assistance of both trial and appellate counsel. Because Pitts presented a claim of ineffective assistance of trial counsel on direct appeal, that claim is now foreclosed from collateral review. See Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998), cert. denied. Pitts is not precluded from arguing that appellate counsel's litigation of trial counsel's ineffectiveness was itself ineffective. See Seeley v. State, 782 N.E.2d 1052, 1060 (Ind. Ct. App. 2003), trans. denied, cert. denied.

A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. Dawson v. State, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004), trans. denied. A petitioner making such a claim must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Id. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. Id.

In other words, Pitts must prove that: (1) his trial and appellate counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of Pitts's Sixth Amendment right to counsel; and (2) his trial and appellate counsel's deficient performances prejudiced his defense. See id. To establish prejudice, Pitts must show that there is a reasonable probability that, but for his counsels' unprofessional errors, the result of the direct appeal would have been different. See id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Pitts contends appellate counsel should have focused on trial counsel's failure to object to the prosecutor's various statements to the jurors regarding Hobson and his plea agreement. We do agree that some of the prosecutor's conduct in this case was improper. We take particular issue with the prosecutor informing several prospective jurors that she personally had once been the victim of a theft, and that her case had been solved through the use of a suspect's statement, with the obvious parallel to Hobson's statement in this

case. In our view, this was tantamount to an inappropriate plea for sympathy, although here the plea was to sympathize with the prosecutor herself, not the actual victims in this case. Cf. Woolston v. State, 453 N.E.2d 965, 970 (Ind. 1983). However, we have found no cases in which a prosecutor attempted a tactic such as this, let alone where a conviction was reversed because of it. We cannot say trial counsel was so egregiously ineffective for failing to object to this tactic that appellate counsel was ineffective for failing to note it on direct appeal.

Pitts also takes issue with the prosecutor asking prospective jurors to imagine they were police officers investigating thefts and whether he or she would consider entering into a plea agreement in exchange for a suspect's testimony against an accomplice. He fails to cite any cases holding that such a tactic is improper. Instead, it has been held that it is proper to use voir dire to inquire into prospective jurors' predispositions to believe or disbelieve a witness who has made a plea bargain agreement with the State. Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981). "We see nothing wrong in inquiring into jurors' minds about their biases in regard to the credibility of witnesses with an eye toward removing prospective jurors predisposed to disbelieve those with certain characteristics, such as plea bargainers." Id. We believe the prosecutor's tactic on this point did not run afoul of Hopkins and was not objectionable. Therefore, appellate counsel was not ineffective for failing to challenge trial counsel's effectiveness on this issue.

One of Pitts's most prevalent complaints is that the prosecutor frequently referred to the requirement of Hobson's plea agreement that he testify "openly, honestly, and truthfully," and the introduction of the agreement and that language into evidence. Trial

R. p. 943. Such language is standard issue in many plea agreements. No case has ever held that jurors cannot be informed of such language in a plea agreement. In fact, our research has revealed that jurors often have been informed of a plea agreement requiring a witness to testify truthfully, without any question as to admissibility. See, e.g., Johnson v. State, 518 N.E.2d 1087, 1089 (Ind. 1988); Pavey v. State, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002), trans. denied. We see no basis for making a claim of ineffective assistance of trial counsel on this issue.

Pitts also takes issue with the prosecutor's calling of Hobson's defense attorney to testify regarding the circumstances of Hobson's plea agreement. Again, Pitts fails to cite any authority that would demonstrate that this testimony was improper. Most of the examination simply recounted the extent of the benefit Hobson was receiving from the plea agreement, which clearly is an appropriate matter for the jury to consider. See Jones v. State, 749 N.E.2d 575, 579 (Ind. Ct. App. 2001), trans. denied.

There were two apparent instances of improper vouching on the prosecutor's part to which trial counsel likely ought to have objected. The first occurred during the prosecutor's opening statement, when she said, "I anticipate that John Hobson will testify truthfully in this case . . . ." Trial R. p. 893. The second occurred, as recited in the Facts section of this opinion, during closing argument when the prosecutor said, "I know in my gut that John Hobson testified truthfully yesterday . . . ." Id. at 1262-63. It is true that a prosecutor cannot make an argument that takes the form of personally vouching for a witness. Schlomer v. State, 580 N.E.2d 950, 957 (Ind. 1991).

We note, however, with respect to the first statement that Hobson had not yet testified; the content of his testimony was not yet known. If Hobson had taken the stand and exonerated Pitts, that statement would have worked to the prosecutor's disadvantage, not her advantage. It should not be a surprise to jurors that a prosecutor anticipates that the witnesses he or she calls will testify truthfully. It is not clear that this statement during opening argument was so inordinately inappropriate and prejudicial that appellate counsel necessarily was ineffective for not labeling trial counsel ineffective for failing to make an objection.

As for the second statement during closing argument, there is no question that it constituted improper vouching for already-given testimony. However, that comment was immediately followed by this: "but it only matters what you think, what your common sense tells you, what your life experiences tell you and what your wisdom tells you about this evidence. You are the sole judges." Trial R. p. 1263. In Schlomer, there was an objection to the prosecutor's vouching statement during closing argument, after which the trial court instructed the jury to disregard the statement and the prosecutor said, "I apologize. My opinion doesn't matter, it's your opinion that matters. We've all done our job. You go back and weigh the evidence, you do your job and convict Mr. Schlomer." Schlomer, 580 N.E.2d at 957. Our supreme court concluded that the remedial measures and the prosecutor's comments mitigated the effect of the improper vouching and the trial court did not err in denying the defendant's mistrial motion. Id.

It is true that here, there was no objection and the jury was not explicitly instructed to disregard the prosecutor's improper vouching. Like Schlomer, however, the

prosecutor did immediately remind the jury that only their opinion as to Hobson's credibility mattered, and that they were the sole judges of that credibility. Although not completely mitigating the improper vouching, these statements should have reduced its prejudicial effect.

"Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel." Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002), cert. denied. Appellate counsel is not ineffective if the decision to present some issues and not others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. Id. In this case we have an improper reference in voir dire to the prosecutor herself having once been a theft victim and an improper vouching statement during closing argument, mitigated somewhat by the prosecutor's subsequent comments. Other instances of alleged improper vouching or prosecutorial misconduct either were not misconduct at all, or Pitts has failed to provide any citation to cases clearly disapproving of such conduct.

On direct appeal, appellate counsel chose instead to focus on trial counsel's repeated mentioning not only of Pitts's criminal history, which we noted in our direct appeal opinion was an appropriate strategic or tactical decision, but also of Pitts's juvenile delinquency history, unemployment, drug use, and school problems. At least some of Pitts's criminal history might have been admissible as impeachment evidence against him, and so it was reasonable for trial counsel to attempt to blunt the effect of such evidence by preemptively introducing it, rather than waiting for the State to do so when Pitts testified. See Ind. Evidence Rule 609(a). The same is not necessarily true of

the other unfavorable character matters trial counsel brought to the jury's attention. See Ind. Evid. R. 609(d) (evidence of juvenile adjudications generally inadmissible). Balancing this issue of alleged trial counsel ineffectiveness that appellate counsel did raise against the one he did not, i.e. failure to object to allegedly improper vouching, we cannot say it was an unreasonable choice. We cannot say the vouching issue was clearly a stronger issue than the character evidence issue. Pitts has failed to convince us that he received ineffective assistance of appellate counsel.

Conclusion

The post-conviction court properly concluded that Pitts failed to meet his burden of establishing that he received ineffective assistance of appellate counsel. We affirm the denial of his PCR petition.

Affirmed.

NAJAM J., and BAILEY, J., concur.